



Witness Preparation:
“If ye are prepared, ye shall not fear.”



~~Witness Preparation:~~ Prosecutor Preparation

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“Horse-shedding the Witness”

James Fennimore Cooper coined this term when he observed lawyers taking witnesses from a New York Courthouse to a nearby horse shed to rehearse their testimony.



The key issue is how to determine the fine ethical line between “developing testimony so it will be effective and suborning perjury by telling the witness what to say.”

-- *McElhaney's Trial Notebook*

Prepping

vs.

Coaching

NDAA Prosecution Standards

2-10.4 Witness Interviewing and Preparation

The prosecutor shall not advise or assist a witness to testify falsely. The prosecutor may discuss the content, style, and manner of the witness's testimony, but should at all times make efforts to ensure that the witness understands his or her obligation to testify truthfully.

Anatomy of a Murder (1959)





THE **TRUTH** IS LIKE A **LION**.
YOU DON'T HAVE TO DEFEND IT.
LET IT **LOOSE**. IT WILL DEFEND ITSELF.

– *St. Augustine*

Our goal is universal:
The whole truth well told.

Three Goals of Witness Preparation

- 1) Educate yourself
- 2) Assess witness ability
- 3) Prepare witness for testimony

These three rules apply without exception regardless of the type of witness you are preparing

Victim Preparation



NEVER treat a victim like they are a witness to their own crime.

"Just the Facts, Ma'am"
Ain't Gonna Cut It.

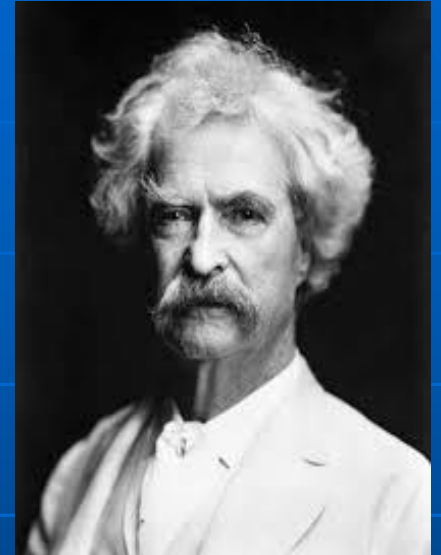


First Impressions Matter



Advice to Witnesses, by Mark Twain

Witnesses who expect to be questioned on the part of the prosecution should always come prepared to answer the following questions: "Was you there, at the time?" "Did you see it done, and if you did, how do you know?" "City and County of San Francisco?" "Is your mother living, and if so, is she well?" "You say the defendant struck the plaintiff with a stick. Please state to the Court what kind of a stick it was?" "Did it have the bark on, and if so, what kind of bark did it have on?" "Do you consider that such a stick would be just as good with the bark on, as with it off, or vicy versy?" "Why?" "I think you said it occurred in the City and County of San Francisco?" "You say your mother has been dead seventeen years - native of what place, and why?" "You don't know anything about this assault and battery do you?" "Did you ever study astronomy? - hard, isn't it?" "You have seen this defendant before, haven't you?" "Did you ever slide on a cellar door when you were a boy?" "Say: did this occur in the City and County of San Francisco?" The Prosecuting Attorney affords a great deal less than no assistance to the Judge, who could convict sometimes if the District Attorney would remain silent, or if the law had not hired him at a salary of two hundred and fifty dollars a month to unearth the dark and ominous fact that the "offence was committed in the City and County of San Francisco."



**If you tell
the truth
you don't
have to
remember
anything.**

Mark Twain

happytoinspire

It's about the Relationship



- Acknowledge the harm
- Build trust
- Establish Rules
- Remove any incentive to omit/distort/change the facts

Explain the Two Types of Testimony

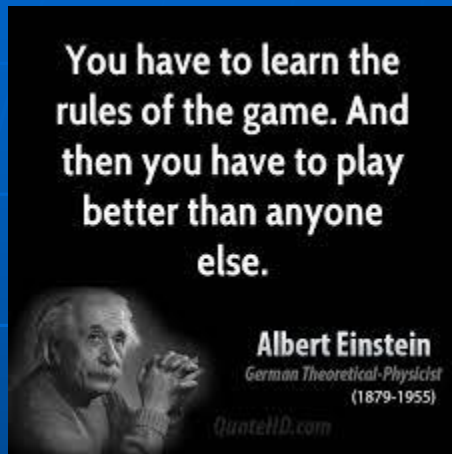
■ Direct Exam

- Two people who agree having a conversation
- Witness should do most of the talking
- Give as much detail as possible about the crime

■ Cross Exam

- Two people who disagree having a conversation
- Lawyer wants to do most of the talking
- Point out gaps, inconsistencies, flaws of witness

Explain the Rules of the Game



- Admissible Testimony:
 - Testimony has to be relevant
 - Witness has to have personal knowledge in order to answer
 - Bias is always relevant

Explain the Rules of the Game



Rules written in stone:

- Make sure you understand a question before answering it.
- NEVER guess.
- ALWAYS tell "the truth, the whole truth and nothing but the truth."
- NEVER argue with a judge or lawyer.



- The most effective witness preparation is to SHOW and TELL witness what testimony will be like. Show witness the likely content, style and tone of questions.
- For a key witness, consider totally separate preparation meetings for direct and cross exam.
- For a key witness, ask another attorney to assist by doing cross exam preparation.

Appearance Matters



Appearance Matters

- “Most witnesses wear professional but comfortable clothes.”
- “How would you dress for a job interview?”
- “What are you thinking of wearing to court?”



Discuss HOW to testify

- "I want you to do most of the talking in court."
- "I will ask short questions so that the jury will focus on you, not me."
- "Be calm and professional when the defense is asking questions."
- "What would be the best way for you to explain X to the jury?"
- "When you are giving a long answer, you can turn and look at the jury."

Assess Witness Ability

How much testimony should one witness give?

Factors:

- Witness fatigue/stress
- Witness confusion
- Presenting too much through one witness may cause the main points to be missed by the jury, or may cause the witness' testimony as a whole to be undervalued



“What is it that we want the judge/jury to understand?”



“Help Me Help You”



Witness should help prepare prosecutor on how best to present direct exam

Example: “What is the best way to present this so that the jury will understand?”

Example: “What do you think the defendant will try to use against you?”

- Relationships
- Prior bad acts
- Convictions
- Motives



Prepare for Possible Disasters

- "What can we do to make this easier for you?"
- "If you are feeling stressed/sick/upset, you should ask for a break."
- "If you forget something, it's not a big deal. I can show you something to refresh your memory."
- "Just be yourself. The jury will understand if you are stressed/cry/get confused."

How much prep?

Risks of under prep:

- Witness nervous
- Less memory of facts
- Fail to assess witness ability

Risks of over prep:

- Witness appears rehearsed
- NOTE: It is better for a witness to appear quirky or imperfect than scripted or coached



Specifics to Cover



- The elements of the crime
- Things the jury will care about
- Tell victim not to minimize
- Un-photoshopped version
 - “Jury needs the whole truth/accurate picture/all details.”
- Known defense attacks

“And the Password is. . .”



Questions/Comments

